

UNITED STATES COURT OF APPEALS May 20, 2008

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

DARRYL WAYNE MANCO,

Movant.

No. 08-3044
(D.C. No. 5:07-CV-03184-SAC)
(D. Kan.)

ORDER

Before **LUCERO**, **GORSUCH**, and **HOLMES**, Circuit Judges.

Darryl Wayne Manco has filed a motion for remand. In July 2007, Mr. Manco filed in the district court a pleading styled “Notice of Intent to File a Petition for a Writ of Habeas Corpus, Pursuant to 28 U.S.C. 2254.” The district court construed this pleading as a § 2254 habeas corpus petition, and gave Mr. Manco thirty days to demonstrate why the petition should not be dismissed as barred by the statute of limitations. The district court did not, however, give Mr. Manco the opportunity to withdraw or amend his pleading in response to the district court’s treatment of the document as an actual habeas corpus petition. Mr. Manco responded to the district court’s order, and the district court ultimately dismissed the petition as untimely. Mr. Manco then filed a motion for reconsideration. In its decision on the motion for reconsideration, the district court concluded that part of the motion asserted true Fed. R. Civ. P. 60(b) claims,

but that the remainder of the motion should be treated as a second or successive habeas petition. The court then transferred the second or successive portion of the motion to this court to allow Mr. Manco the opportunity to seek authorization under 28 U.S.C. § 2244(b)(3) to file those claims. Mr. Manco's appeal of the dismissal of his first petition is currently pending before this court in a separate action. *See Manco v. Werholtz*, Case No. 07-3363. Thus, the only issue before us is the proper treatment of that portion of the motion for reconsideration that the district court deemed to be a second or successive habeas petition.

This court notified Mr. Manco that he could seek authorization to file the second or successive claims or, if he felt that the district court had erred in construing the claims as second or successive, he could file a motion for remand. Although Mr. Manco filed the form for seeking authorization, he actually is seeking remand to the district court. *See* Mot. for Leave, Attach. at 8 (requesting that this court "reverse this issue back to the District Court for further proceedings"). He argues that the district court erred by construing his "Notice of Intent to File" a habeas petition as an actual habeas petition. *Id.* at 1. He asserts that if he had been afforded the opportunity to file an actual § 2254 petition, or to amend the filing that the district court construed as a habeas petition, he would have raised one of the claims that the district court treated as second or successive. *Id.* at 1-2.

We agree that Mr. Manco is entitled to remand because the district court failed to follow the procedure set forth in *Castro v. United States*, 540 U.S. 375, 383 (2003), when it construed his “Notice of Intent to File” a § 2254 habeas petition as an actual § 2254 habeas petition.¹ In *Castro*, the Court held that

[W]hen a court recharacterizes a *pro se* litigant’s motion as a first § 2255 motion . . . the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on “second or successive” motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all of the § 2255 claims he believes he has.

Id. The remedy for the district court’s failure to follow this procedure is that the recharacterized motion “cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law’s ‘second or successive’ restrictions.” *Id.* Accordingly, Mr. Manco’s “Notice of Intent to File” a habeas petition does not count as a first habeas petition. Because of this, the claims that the district court transferred to this court do not constitute second or successive

¹ Although *Castro* dealt with a 28 U.S.C. § 2255 motion, we have noted that a district court must follow the procedure set forth in *Castro* before recharacterizing pro se pleadings as bringing claims under either §§ 2255 or 2254. See *Davis v. Roberts*, 425 F.3d 830, 835 (10th Cir. 2005).

claims and no authorization is required for their filing. The motion for remand is GRANTED, and the matter is terminated in this court.

The entry of this order has no effect on appeal number 07-3363.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk